Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of *Third Memorandum Opinion And Order*, Released 11/18/03	)	PR Docket No. 92-257
In the Matter of Applications of Warren C. Havens For New Automated Maritime Telecommunications Systems Dismissed Per *Second Memorandum Opinion, And Order*, PR Docket No. 92-257	)	File Nos.: *Group A1:* 853032 -035 (Guadalupe River), 853036 -037 (Lake Mojave), 853038 -042, 044 –046, 855043 (Brazos River), 853057 -058 (South Platte River), 853059 -060 (Provo River), 853070 -072 (Truckee River), 853175 -176 (Upper Chattahoochee River), 853190 -193 (Upper Rio Grande River), 853252 -258 (Catawba River), 853460 -461 (Hawaiian Islands coastline), *Group A2*: 853562 -569 (Missouri RBSNP), 853570 -576, -578- 581 (MCKARNS) ***Group B:*** 53611 (MCKARNS), 853615 (South Platte River), 853667 -668 (Owens River), 853669 -674 (Kings River), 853675 -676 (Highland Lakes), 853677 (Mt. Desert Island- Acadia

To the Commission

Petition for Reconsideration

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December 18, 2003

Petition for Reconsideration

I, Warren C. Havens ("Havens"), submit this petition for reconsideration under Sections 1.429 and 1.106 of the Commission Rules (the "2nd Petition") of the decisions within the *Third Memorandum Opinion and Order* in PR Docket No. 92-257, released November 18, 2003 (the "*Third MO&O*"), which denied my May 8, 2002 Petition for Reconsideration (the "May 8th Petition") of the dismissals of my applications for new Automated Marine Telecommunications System ("AMTS") licenses listed in the caption above (the "Applications") made in the *Second Memorandum Opinion and Order* in this docket released April 8, 2002 (the "*Second MO&O*").

This 2nd Petition presents and is based upon new facts as to why the Applications should be processed and not remain dismissed. Havens did not have and could not have had knowledge of these facts until after the deadline to file the May 8th Petition had passed.

The Alleged Mutually Exclusive Situation Was Resolved

The applications of Mobex Network Services, LLC ("Mobex")1 that caused the alleged mutually exclusive ("MX") situation with the Applications (the "Mobex Applications") were, along with the Applications, dismissed in the *Second MO&O*. As noted above, Havens filed the May 8th Petition seeking reconsideration of the dismissal of his Applications. Mobex opposed this May 8th Petition. Mobex did not file for reconsideration of the dismissal of the Mobex Applications either by the deadline for a timely filed petition for reconsideration, or after seeing and opposing Havens' May 8th Petition. Havens could not know whether or not Mobex would file a timely or late-filed petition for reconsideration of the dismissal of the Mobex Applications. By not filing a petition for reconsideration, Mobex allowed the dismissal of the Mobex

1 By "Mobex" we also mean Mobex Communications, Inc. and Regionet Wireless Licensee, LLC that are wholly owned by Mobex.

Applications to become final and non-appealable. The Havens Applications, however, remained pending since Havens timely filed the May 8th Petition. This fully resolved the alleged MX situation and the Applications may and should be processed in accord with the Commission's announced decision to continue to process AMTS applications that do not seek additional spectrum or service area.2 In sum, Mobex gave up prosecution of the Mobex Applications and this resolved the MX situation.3

As noted above, since Havens submitted the May 8th Petition, the dismissal of the Applications were made subject to administrative appeal and the Applications remained pending on appeal. They remain on appeal at this time due to the timely submission of this 2nd Petition, and due to Havens concurrently filing a *Petition for Review* and a *Notice of Appeal* in the United States Court of Appeals for the District of Columbia Circuit concerning the part of the *Third*

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2 Amendment of the Commission's Rules Concerning Maritime Communications, *Fourth Report and Order and Third Further Notice of Proposed Rule Making*, PR Docket No. 92-257, 15 FCC Rcd 22585, 22621, ¶77 (2000) (the "*Forth R&O*"). This decision and the related "freeze" on applications for new AMTS station licenses in the Forth R&O did not ban resolution of the above noted MX situation, including by the process discussed above. Also, the Commission did not find in the *Third MO&O* that Havens had no right to submit and get a response to the May 8th Petition.

3 Within Commission files on the Mobex Applications is a cover letter from Martin Bercovici, Mobex's counsel at that time, dated March 27, 2000, making entirely clear the purpose of Mobex in filing these applications. It was solely to create a MX situation so that the Havens Applications would eventually be dismissed along with these Mobex Applications—"suicide bomber" applications or "strike" applications. Mobex, by its own pronouncement of intent, never sought to have its applications granted, but merely to block the Havens Applications. Had it wanted to continue with this intent, however, it would have had to petition to keep its applications pending when Havens did the same. Mobex had every reason (per the history of Havens' filings before the Commission to defend against Mobex's attempts to block or deny his entrance into AMTS) to expect Havens would submit the May 8th Petition, and yet it failed to submit a "protective" petition of its own, or to seek approval to submit a late-filed petition after seeing the May 8th Petition. For whatever the reason, it failed to maintain this attempt to block the Havens Applications as stated above and this failure resolved the MX situation.

MO&O that upheld the dismissal of the Applications and denied the May 8th Petition.4 Thus, from the date the Applications were filed to the present time, they have been and remain pending.

Under law, including the Communications Act and Commission rules, a license application is pending until subject to a FCC Order dismissing or denying it that is no longer subject to an appeal thereof.5 Such application on appeal remains pending, including for purposes of updates (see preceding footnote) and allowance of waiver requests6 and for resolution of MX or other defects. In sum, the established administrative and judicial appeal process has meaning, in cases of dismissals and denials of license applications, only since they remain pending on appeal with the possibility of processing and grant if the appeal succeeds.

Also, a major AMTS application proposing to serve most of a waterway in Colorado and the surrounding population (most of the state's population) that was subject to the "freeze" on new and expanded licensing in the *Fourth R&O* and that was not grantable due to a defect in

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4 The appeal under the instant petition for reconsideration is based on the new facts and situations described herein. The appeals to the Court (which Havens asked to be consolidated) is of the decision made on the applications in the *Third MO&O* based on previous facts as presented in the *May 8th Petition*. Havens intends to request that the Court hold the (consolidated) case in abeyance pending a decision on the instant petition for reconsideration.

5 For example, this principle is reflected in Section 1.65 of the Commission's Rules. ". . . [A]n application is 'pending' before the Commission from the time it is accepted for filing before the Commission until a Commission grant or denial of the application is no longer subject to reconsideration by the Commission or to review by any court."

6 Also reflecting the status of dismissed or denied applications as still pending when on appeal, see *Memorandum Opinions and Order,* FCC 02-256, released 9-18-02, regarding certain Havens' AMTS applications for service in Texas, where the Commission notes: ". . . Havens did not request a waiver of Section 80.475(a) [the Coverage Rule] . . . at any point during this proceeding." If these applications were not pending in this appeal proceeding, then he could not have submitted the indicated waiver request.

required service-contour coverage, was nevertheless considered pending after the freeze and thus, when the defect was cured, it was granted.7

Thus, in the instant case, neither the freeze nor the alleged MX situation negated the pending status of the Applications on appeal after their dismissal, nor prevents resolution of this alleged MX situation by the situation noted above (nor by the alternative discussed below).

Thus, the Commission may and should process the Applications since the alleged MX situation has been fully resolved.

No Interference Rule Previous to *Third MO&O,*
And no MX Determinations Possible Under the No-Review Reported Therein.
Thus, Past MX Determinations Flawed or Non-Existent, and They Must Now Be Made

If the above argument is accepted, then the below is moot. It is thus submitted in the alternative to the above argument.

The Commission, prior to the *Third MO&O,* had no interference contour by which to determine MX applications. Now that an interference contour has been established, once it is in effect the Commission must now review the subject Havens Applications and Mobex Applications to ascertain which stations are MX and which are not.8

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7 After the *Fourth R&O* was released, Havens filed to resolve a service-area-coverage-gap defect in his AMTS multi-site application to serve the South Platte River. Since this proposed resolution not seek additional service area or spectrum, and was otherwise within the rules, it was accepted and the application was then granted (WPSQ413, granted 7-10-2001).

8 In the *Third MO&O*, the Commission stated that Section 1.934 is discretionary. This is specious in that this same Order, with regard to upholding the dismissals of the Applications, rested upon its assertion that it did undertake a review under section 1.934 to ascertain whether the subject applications (i) were acceptable for filing (having a signature, and fee) and (2) were indeed MX. In any case, it did report that the Mobex Applications MX'ed the Havens Applications and this required a careful review of the technical aspects of the subject applications and the application of a service-coverage standard, which the Commission did not yet have.

Thus, the past determinations that the Mobex Applications created a MX situation with the Havens Applications were no more than staff speculations, "eyeballing," or preferences: this is a technical determination but there was no technical rule to use to make this determination. These determinations of alleged MX were thus clearly flawed and must be rejected.

Further, according to a key assertion in *Third MO&O*, there was no MX review and determination at all: the only specific check of the Mobex Applications reported was to see if they were signed and had the required fee payment. Since the Commission stated in the *Third MO&O* that it did not undertake a review of defects under section 1.934, it could not have ascertained the MX situation either. Conversely, if any actual review to determine MX was made, then the same review would have turned up threshold defects noted in the May 8th Petition. 9

Thus, the *Third MO&O* makes clear that the determinations of MX were defective and must be rejected. The Commission should remand the matter to the Bureau with instructions to apply the AMTS rule-based interference standard once it is final and in effect.10 It should also instruct the Bureau, in making this determination of MX, to complete a review of defects under

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9 A review of geographic MX involves the same exercise as a review to see if the (then required) engineering showing of geographic continuity-of-service was provided, and that is a function under section 1.934(d)(1). In addition, a review of geographic MX involves a review of the spectrum applied for, and the same exercise would reveal whether the applied-for spectrum is or is not available per the clear policy that was in place to not accept applications for both the AMTS A and the B blocks at the same time, which is a function under sections 1.934(d)(2) and 1.934(e), and to not allow strike applications that sought the same spectrum as a previous applicant when alternative (in this case virtually identical) spectrum was available.

10 Once it is final and effective. Havens may timely petition to reconsider some aspects of the decision on this interference standard. Others may also.

section 1.934, certainly all that are revealed in the review to determine MX if no pretense is involved.11

Respectfully submitted,

*[Signature on file]**

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*[Filed Electronically via ECFS in PR Docket 92-257 and RM-9664]

11 For reasons Havens has noted in the May 8th Petition, the instant petition, and the above-noted appeals to the DC Circuit Court, it is apparent that there is lack of candor involved here. The Commission should be candid with its applicants and licensees, as much as they must be candid with the Commission.

Declaration

I, Warren C. Havens, hereby declare, under penalty of perjury, that the foregoing Petition for Reconsideration was prepared pursuant to my direction and control and that all the factual statements and representations contained herein are true and correct.

*[Signature on file]**

Warren C. Havens

*[Filed Electronically via ECFS in PR Docket 92-257 and RM-9664]

Certificate of Service

I, James Stobaugh, an employee of Warren C. Havens, certify that I have, on this 18th day of December 2003, caused to be delivered, via USPS first-class mail, a copy of the foregoing Petition for Reconsideration to the following:

By US mail first class to:

Dennis C. Brown, Esq. (Counsel for Mobex)
126/B North Bedford Street
Arlington, VA 22201

*[Signature on file]**

James Stobaugh

*[Filed Electronically via ECFS in PR Docket 92-257 and RM-9664]